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IN THE

Supreme Court of the United States

October Term, 1959

No. 259

UNITED STATES OF AMERICA,

Petitioner,

v.

BERNARD W. COBLENTZ, et al.

BRIEF FOR RESPONDENT, BERNARD W. COBLENTZ, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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(1)

The facts here are not disputed and the statement of facts contained in the petition to this Court is sufficiently accurate and requires little comment.

(2)

A lien for United States taxes attaches to the "property and rights to property whether real or personal belonging to" a tax debtor (26 United States Code, §6321) at the time the assessment is made (*ibid.*, §6322). It is not valid, however, against "any mortgagee, pledgee, purchaser, or judgment creditor, until filed" in the appropriate office designated by the state where the property is located [*ibid.*, §6323(a)].

Under the New York Judiciary Law, Section 475, an attorney's lien exists from the time of the commencement of an action or proceeding upon the client's cause of action or claim and *attaches* to a verdict, report, determination, judgment or final order "in his client's favor and on the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination."

On March 8, 1954, respondent Coblentz, an attorney at law, was retained by a taxpayer, Tailored Contour, Inc., a lessee upon premises about to be taken by eminent domain, by written retainer containing an assignment of 20% of the award and interest to represent it in the Washington Square Slum Clearance Project condemnation proceeding (R. 14-15). At that time, the corporation owed no taxes to the United States.

On May 23, 1956, a federal tax lien was filed. The title taking had been effected on August 5, 1955, more than 9 months before the filing and the Coblentz retainer preceded the tax lien notice by more than 26 months.

The New York Courts held (one Justice dissenting) that the respondent Coblentz, by virtue of the assignment clause in his retainer contract was a "purchaser" of property or "rights to property" within the meaning of §2623 (formerly §3672) of title 26 of the United States Code (Appendix, annexed to petition). The Government challenges the correctness of this decision by the highest court of the State of New York. We believe that the Government is in error.

(3)

The New York Court of Appeals held that by virtue of the assignment clause in his retainer contract, as well as by the provisions of the New York Judiciary Law, Section 475, Coblentz acquired a vested property interest in the award which he had "purchased" for a good and valuable consideration, to wit: his services as rendered and to be rendered in the premises. We doubt if this ruling is open to review by this Court since title to property and rights to property are exclusively matters of state law. *United States* v. *Bess*, 357 U. S. 51; *Herrmann* v. *Rogers*, 358 U. S. 332; *Rogers* v. *Calumet Nat. Bank of Hammond*, 358 U. S. 331; *Aetna Casualty & Surety Co.* v. *United States*, 4 N. Y. 2d 639.

By Federal statute, liens for taxes owing to the United States attach only to "property and rights to property" belonging to the taxpayer. Judge MEDINA aptly stated: "In adopting this legislation, the Congress did not create property interests on which a lien might be imposed; there is no suggestion that it authorized the federal courts to do so. On the contrary, it took for granted here, as it normally does in the tax law, the vital existence of state laws creating and maintaining various interests. • • • The classification of interests is a federal question; the existence of the interests to be federally classified, however, is solely a question of state law." *Fidelity & Deposit Co. of Maryland* v. *New York City Housing Authority* (2d Circ.), 241 F. 2d 142, at p. 144.

(4)

Under New York law, Coblentz was a purchaser for a valuable consideration of a 20% interest in the property belonging to the taxpayer. The only "property" or "rights to property" belonging to the taxpayer was the balance of the proceeds remaining after the attorney's retainer assignment was satisfied in full. Since the Federal lien for taxes attaches only to "property and rights to property" belonging to the taxpayer (Section 6321, United States Code, Title 26) the unassigned balance alone was subject to the tax. The question turns on who holds the "property and rights to property" liable for the tax and not on priority in payment of conflicting claims.

The Government's lien for taxes was not filed until May 23, 1956, two years and two months after Coblentz's retainer contract and after he had fully performed services necessary to create the fund.

(5)

Coblentz's attorney's lien is rooted in the express provision of the New York Judiciary Law, §475. The lien is specifically upon the right of the client and not merely upon its proceeds and the "property and rights to property" of the client to which alone the Federal lien can attach consists only in the avails of the prosecution of the client's right, after satisfaction of the lien of the attorney for his efforts in bringing the avails of the rights into hand.

Furthermore, in point of time, the Government's claim was last and its tardiness in filing may not be excused by asserting sovereign paramountcy. To do so, would be the reverse of the rule under which recovery had been allowed in *United States* v. *Ball*, 355 U. S. 587 cited by the Government (Petition page 10).

(6)

Coblentz was retained on March 8, 1954, to obtain a fixture award in condemnation for Tailored Contour, Inc. Title vested in the City of New York on August 5, 1955, so that at that date, at latest, the proceeding commenced. The attorney's statutory lien on his client's chose in action could not have arisen later than August 5, 1955. On that date, by virtue of his retainer agreement of the previous year, Coblentz obtained the statutory lien on the chose in action itself on an agreed percentile amount. That lien was by no means "inchoate" but an existing and specific lien on the cause of action and not merely on the future award or the future proceeds to which, indeed, the lien would also "attach" when they came into being.

Since the attorney's lien is *upon* the cause of action and "attaches" to the award and to its proceeds, there is no moment of time after the two statutory facts concur—commencement of proceeding and retainer of attorney—at which the tax lien could come in and attain a priority. The attorney's lien does not arise when the award is made, or when it is paid; it "attaches" because it was pre-existing as a lien specific and inescapable on the cause of action which generated the award and its proceeds.

Tailored Contour, Inc. had no power to deal with the cause of action, or the award upon it, or the proceeds of that award, to the extent that the cause of action, award and proceeds reflected the attorney's contractual lien.

The laws of the several States including the common law, as declared by the highest courts of such States, prevail upon and are enforced in the courts of the United States

except where the Constitution, Treaties or Statutes of the United States otherwise require (*Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64). We have already shown (*ante*, p. 3) that the determination of what constitutes property of a taxpayer on the date of the asserted lien by the Government is a matter of State law. (See the cases cited at pages 18 and 19 of the Appendix).

The learned opinion of Mr. Justice Dye in the Court of Appeals, annexed to the Appendix, sufficiently answers the other points made by the Solicitor General in his brief.

CONCLUSION

The writ of certiorari should be denied.

September 16, 1959.

Respectfully submitted,

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